LAU KIENG CHUNG

v.

PUBLIC PROSECUTOR

HIGH COURT, SIBU
TUAN STEVE L.K. SHIM J.
[CRIMINAL APPEAL NO. 22 OF 1992]
28 MAY 1993

CRIMINAL LAW: Charge of knowingly concerned in conveying uncustomed goods - Customs Act 1967 s. 135(1)(a) - Ingredients - Whether goods uncustomed goods - Whether accused had knowledge that goods were uncustomed - Whether there was intention to defraud the Government of duties thereon.

CRIMINAL PROCEDURE: Charge of knowingly concerned in conveying uncustomed goods - Customs Act 1967 s. 135(1)(a) - Burden of proof that goods were uncustomed - Whether on the prosecution - Whether by virtue of s. 119 of the Act the burden thereof shifted to the accused.

This was an appeal by the appellant against the decision of the Magistrate's Court, Sibu, convicting him of an offence under s. 135(1)(a) of the Customs Act 1967, of being knowingly concerned in conveying uncustomed goods to wit. 1052 cartons of beer with intent to defraud the Government of the duties thereon, and sentencing him, in consequence thereof, to a fine of RM50,000 in default six months imprisonment.

The main grounds of appeal were firstly, that the Magistrate was wrong in holding that the goods in question were uncustomed goods as no evidence had been adduced by the prosecution that the goods were in fact uncustomed, secondly that the Magistrate had failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods were uncustomed and thirdly that the Magistrate had erred in finding that there was intention to defraud on the part of the appellant.

Held:

[1] In order to establish that the goods were uncustomed goods, the prosecution needs to prove two conditions, namely, that the goods were imported and that duties thereon had not been paid. However, by virtue of s. 119 of the Act this burden shifted to the accused with the result that it was the accused who must show either that the goods in question were not imported or that duties thereon had been paid. On the facts, the appellant had failed to show either of these and the Magistrate, therefore, cannot be said to have erred in holding that the goods specified in the charge were in fact uncustomed goods. Of neccessity, the contention of the appellant that the prosecution must adduce evidence to establish that the relevant goods were uncustomed, must also fail.

[2] Under s. 135(2) of the Act, a rebuttable presumption would arise that the appellant had knowledge that the goods he conveyed were uncustomed goods unless the contrary is proved. The appellant can rebut this presumption by proof of circumstances from which it is reasonable to infer or conclude, on a balance of probabilities, that he could not possibly have known or acquired the imputed knowledge. The Magistrate, who disbelieved the story of the appellant, made a finding that the appellant had failed to rebut this presumption of knowledge. On the evidence, bearing in mind particularly that the Magistrate had the opportunity of observing the demeanour of the appellant, this Court is unable to say that the Magistrate was wrong in her assessment. In the circumstances the contention of the appellant that he did not know that the goods were uncustomed, or that the Magistrate had failed to consider whether the appellant had discharged the onus in respect of presumption of knowledge, is unsustainable.

[3] The appellant, having realised that the goods were uncustomed, should have refused to convey the goods. There was all the more reason for him to refuse if, as he alleged, the goods belonged to some strangers who had not paid the relevant customs duties on the goods. That he did not do so is clear testimony that he had deliberately and positively assisted them evading customs duties on the goods. The amount of goods the appellant was conveying, being 1052 cartosn of beer, was quite substantial, and hence, being a reasonable man, the appellant should have known that the amount of customs duties payable thereon would be substantial. In the circumstances it would be reasonable and proper to conclude, as the Magistrate had done, that the appellant had intended to defraud the Government.

[Appeal against conviction and sentence dismissed].

Cases referred to:

Yap Yoon Lin v. Regina [1954] 20 MLJ 59 ***(refd)***

Kee Kim Chooi & Ors. v. Public Prosecutor [1952] 18 MLJ 180 ***(refd)***

Public Prosecutor v. Fatimah [1960] 26 MLJ 109 ***(refd)***
Wolfgang Pzetzhold v. Public Prosecutor [1970] 2 MLJ 199 ***(refd)***
Public Prosecutor v. Tay Yew Lia [1957] 23 MLJ 17 ***(refd)***
Koo Cheh Yew v. Public Prosecutor [1980] 1 MLJ 235 ***(cit)***
Ng Kim Huat v. Public Prosecutor [1961] 27 MLJ 308 ***(dist)***
Public Prosecutor v. Chieng Ung Kai (Criminal Appeal No. 25 of 1989) ***(dist)***
Lim Kim Chai v. Public Prosecutor [1963] 29 MLJ 26 ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 2, 10, 119, 135(1)(e), (i), (2)
Customs Enactment, s. 99
Customs Ordinance 1952, s. 115, 131

For the appellant - George Lim; M/s. Battenberg & Talma
For the respondent - Abdul Rahman bin Sebli, DPP

JUDGMENT

Steve L.K. Shim J:
This is an appeal by the appellant Lau Kieng Chung against the decision of the Magistrate's Court, Sibu, made on 14 November 1991. Thereat, the appellant had been convicted of an offence under s. 135(1)(e) of the Customs Act l967. He was ordered to pay a fine of RM50,000 in default 6 months imprisonment. The charge against him reads as follows:

> That you at about 3.00 p.m. on 8 May 1988 at about 6 1/2 Mile, Oya Road, Sibu, were knowingly concerned in conveying uncustomed goods, to wit, 383 cartons x 24 cans x 355 mls. of 'Carlsberg' beer and 669 cartons x 24 cans x 330 mls. of 'Heineken' beer on a truck plate registration No. SD 1518 with intent to defraud the Government of the duties thereon, to wit RM34,400.31 and thereby committed an offence under s. 135(1)(e) of the Customs Act 1967, and punishable under s. 135(1)(i) of the same Act,

Although 10 grounds of appeal are propagated in the petition of appeal, Mr. George Lim, Counsel for the appellant has, at the outset, indicated that, for the sake of convenience, he would concentrate his submission upon 3 propositions, namely, that the learned Magistrate was wrong in holding that the goods, subject matter of the charge, were uncustomed goods; that the learned Magistrate had failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods were uncustomed and that the learned Magistrate had erred in finding there was intention to defraud on the part of the appellant. I shall deal with them separately but before that, I should perhaps consider the ingredients necessary to sustain such a charge in relation to uncustomed goods. They are (1) that the accused person was knowingly concerned in conveying uncustomed goods and (2) that in doing so, he had intended to defraud the Government. As regards the first ingredient, Spencer Wilkson, J. in *Yap Yoon Lin v. Regina* [1954] 20 MLJ 59 had said *inter alia*:

> I think the prosecution must, before conviction as a part of their case, prove that there was a conveying of the goods and that these goods were already uncustomed at the time they were conveyed. In other words, the offence of breach which resulted in the good being uncustomed must, I think, be prior in time to the conveying of the goods ..... In other words, I think the natural meaning of the words 'knowingly concerned in conveying uncustomed goods' is 'being knowingly concerned in conveying goods which one knows, at the time that they are conveyed, to be uncustomed' and not 'concerned in conveying goods which one knows will become uncustomed goods if they are conveyed'.

It seems clear from the above passage that in order to establish the first ingredient, it is necessary to prove (a) that there was a conveyance of the goods by the accused person, (b) that at the time of such conveyance, the goods were uncustomed goods and (c) that the accused person knew that the goods he conveyed were uncustomed goods. I do not think element (a) presents any difficulty but elements (b) and (c) may give rise to some problems. As regards element (b), the case of *Kee Kim Chooi & Ors. v. Public Prosecutor* [1952] 18 MLJ 180 provides sufficient revelation. Therein Thomson J., said *inter alia:*

> As regards the question of whether the tobacco was uncustomed, the prosecution had to prove that it had been brought at sometime from outside Malaya and that duty had not been paid upon it, and to do so they were entitled to invoke the assistance of s. 99 of the Customs Enactment which reads as follows:
>
> If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovering of any penalty or penalties under this Enactment, any dispute shall arise as to whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or lawfully landed, or concerning the

> place whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution.
>
> That section clearly applied for the prosecution was one for penalties under the enactment and when the appellants claimed trial, as they did, the effect of their so doing was to put in dispute every material allegation in the charges against them including the allegations that the tobacco had been brought from outside Malaya, and that duty had not been paid on it. The effect of s. 99, then, was that the proof of their sides of these disputes was upon the appellants, that is to say, they had to satisfy the Court either that the tobacco had not been brought from outside Malaya or that the proper duty had been paid upon it.

From the excerpt above, it would appear that the prosecution need to establish two conditions, namely, that the goods were imported and that duties thereon had not been paid. However, to do this, the prosecution could invoke the assistance of s. 99 of the Customs Enactment which is substantially in *pari materia* with the present s. 119 of the Customs Act which has the effect of shifting the burden of proof onto the accused. It should be noted that s. 119 can be invoked only as regards to matters of dispute specified therein. It does not raise any presumption but merely shifts the burden of proving the matters specified therein. The obligation of the accused under s. 115 of the Customs Ordinance 1952, the predecessor of s. 119, was described by Hepworth, J. in *Public Prosecutor v. Fatimah* [1960] 26 MLJ 109 thus:

> No presumption arises under s. 115 of the Ordinance. When a person is charged and claims trial a dispute arises. Once a dispute has arisen s. 115 says the burden of proof is on the defendant. The defendant may discharge this onus by producing a receipt for the duty or he may know that the duty has been paid and, although unable to produce the receipt, may be able to prove it (see the example of the bottle of whisky in para. 4 of the judgment of Good J. in *Public Prosecutor v. Tay Yew Lia*, *supra*.).

And Good J. in the cited case in fact expanded on this by stating that the effect of s. 115 of the Customs Act 1952 (the predecessor of s. 119) was that if a customs officer found a person in possession of dutiable goods anywhere in the Federation, he could take him to Court and make him prove that duty had been paid or make him rebut the presumption of knowledge created by s. 131 (now s. 135(2)).

This brings us to element (c) which concerns the accused's knowledge that the goods were uncustomed at the time of conveyance. Under s. 135(2), such goods are presumed to be uncustomed to the knowledge of the accused unless he proves to the contrary. Section 135(2) stipulates thus:

> In any prosecution under this section or s. 139 any dutiable, uncustomed or prohibited goods, shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant.

The term "knowledge" according to Sharma, J. in *Wolfgang Pzetzhold v. Public Prosecutor* [1970] 2 MLJ 199, implies a consciousness of facts and that it is of greater import than the term "having reason to believe" see also *Public Prosecutor v. Tay Yew Lia* [1957] 23 MLJ 17. In short, the effect of s. 135(2) is to provide the essential ingredient of knowledge relevant to the charge and places on the accused the duty to prove otherwise. As Thomson, J. had said in *Kee Kim Chooi*, *supra*:

> The effect of that new sub-section clearly is that while knowledge that the goods were uncustomed remains an essential ingredient of the offence described by s. 114(i)(e), that ingredient is now in the first instance supplied by the law itself and it is for the accused person to displace it if he can.

Quite clearly therefore, the presumption under s. 135(2) is a rebuttable one. The accused can rebut this presumption by proof of circumstances from which it is reasonable to infer or conclude, on a balance of probabilities, that he could not possibly have known or acquired the imputed knowledge: see *Koo Cheh Yew v. Public Prosecutor* [1980] 1 MLJ 235.

In the instant case, the propositions or grounds advanced by Mr. George Lim for the appellant have to be considered in the light of the principles and observations alluded above. In respect of the first proposition, Mr. Lim has contended that the learned Magistrate was wrong in holding that the goods specified in the charge were uncustomed goods. In this connection, he seems to submit (and this is also reflected in his submission in the lower Court) that it was incumbent on the prosecution to adduce evidence to show that the goods stated in the charge were uncustomed goods. He cites

in support *Ng Kim Huat v. Public Prosecutor* [1961] 27 MLJ 308, drawing particular attention to the following passage therein:

> By s. 2 'dutiable goods' are 'goods subject to the payment of customs duty and on which such duty has not yet been paid'. By s. 10 customs duties may be levied on goods 'imported into or exported from the Federation.' It is thus clear that the same goods may, at different stages of their existence be 'dutiable goods and goods which are not 'dutiable goods' ... It is only 'dutiable goods' between the moment when it is first imported and the moment on which duty is paid. In other words, before goods on which customs duties have been levied can be described as 'dutiable goods' for the purposes of the Ordinance they must comply with both of two conditions. One is that they must have been imported and the other is that duty must not yet have been paid on them.

I think it should be noted that in the above case, the Court was concerned with a charge of carrying dutiable goods in a local craft otherwise than with the permission of the Comptroller of Customs whereas in our case, the charge relates to knowingly concerned in conveying uncustomed goods. There, the Court was considering the elements which constituted the term "dutiable goods" but in the instant case, we are concerned with the term "uncustomed goods". The facts in *Ng Kim Huat* are therefore distinguishable from this case. In the circumstances, I do not think it is of relevance here. The same must apply to *Public Prosecutor v. Chieng Ung Kai* (Criminal Appeal No. 25 of 1989) cited by Mr. Lim, a case which relied essentially on the dicta in *Ng Kim Huat*. In any event, although the Court in *Ng Kim Huat* held that 2 conditions were required to be established before goods could be described as "dutiable goods," namely, that the goods were imported and that duties thereon had not been paid, there is nothing therein to indicate or suggest that the prosecution, in proving those conditions, could not rely on the assistance of s. 119 of the Customs Act. Indeed, under the said s. 119, the burden of proof on such conditions has clearly been shifted onto the accused person. For the reasons given, I do not, with respect, accept Mr. Lim's contention that the prosecution must, without more, adduce evidence to establish that the relevant goods were uncustomed goods. The burden which has shifted to the accused is sufficiently clear in s. 119. He must therefore show either that the goods in question were not imported or that the duties thereon had been paid. In the instant case, the appellant could not be said to have established either of these. There is not a morsel of evidence by the appellant on this score. In the circumstances and on the evidence, I do not think that the learned Magistrate was wrong in holding that the goods specified in the charge were in fact uncustomed goods. Mr. Lim's first proposition therefore fails.

The second proposition raised by Mr. Lim, namely, that the learned Magistrate had failed to consider whether the appellant had discharged the onus that he had no knowledge that the goods stated in the charge were uncustomed goods now calls for consideration. This relates to the question of whether the appellant knew, at the time of conveyance, that the relevant goods were uncustomed goods. In view of s. 135(2), a presumption would arise that the appellant had knowledge that the goods he conveyed were uncustomed goods unless he could prove the contrary. This, as I have mentioned, is a rebuttable presumption. In this connection, the learned Magistrate had said in her judgment:

> ...and the effect of the presumption under s. 135(2) would place the burden of satisfying this Court on a balance of probability on the accused person that he did not know they were uncustomed.
>
> The accused has failed to discharge this burden. The stories that it was not his duty to inquire as to the nature of the goods he was conveying and that he accepted an offer of carriage of goods from two unknown men without more do not hold water especially taking into account his 20 years experience as a public carrier.

It would seem that as far as the learned Magistrate was concerned, the appellant had not been able to rebut the presumption of knowledge. It was quite evident that she did not believe the story of the appellant. On the evidence, I would not be able to say that she was wrong in her assessment particularly as she had the opportunity of observing the demeanour of the appellant in the witness stand whereas I have none. In the circumstances, I do not think Mr. Lim's proposition aforesaid is sustainable.

I now come to the third and last proposition of Mr. Lim, namely, that the learned Magistrate had erred in finding there was intention to defraud the Government on the part of the appellant. First, I should refer to *Lim Kim Chai*

v. Public Prosecutor [1963] 29 MLJ 26 wherein Adams J. said *inter alia* that:

> the question of intention to defraud remains at all times to be proved by the prosecution in the same way as 'intention' is proved in all criminal cases where guilty knowledge is one of the ingredients of the offence.

Bearing that in view, what does the evidence show? Here, the learned Magistrate has held that the relevant goods were uncustomed and that the appellant knew they were uncustomed goods at the time he conveyed them. If he realised the goods were uncustomed, as a public carrier of some 20 years experience, he should have refused to convey them. Indeed, there was all the more reason for him to refuse if, as he alleged, the goods belonged to some strangers who had not paid the relevant customs duties on the goods. That he did not do so is clear testimony that the appellant had deliberately and positively assisted them in evading customs duties on the goods. Furthermore, the amount of goods he was conveying was quite substantial consisting of 1052 cartons of beer and hence, he would, as a reasonable man, have known that the amount of customs duties payable thereon would also be substantial. In fact, the authorities valued the amount to be exactly RM34,400.32. Under the circumstances, it is, I think, reasonable and proper to conclude, as the learned Magistrate had done, that the appellant had intended to defraud the Government. There is therefore no merit in Mr. Lim's last proposition.

For the reasons stated, I will dismiss the appeal against conviction. As regards sentence, it is sufficient for me to say that there is nothing in the record to indicate that the learned Magistrste had applied the wrong sentencing principles nor do I think that the amount of fine to be manifestly excessive in all the circumstances. Accordingly, the appeal against sentence is also dismissed.

LEE CHI MIN

v.

LEOW TEOW HONG & 2 ORS.

HIGH COURT, KUCHING
DATO' HAJI ABDUL KADIR BIN SULAIMAN J.
[SUIT NO. KG. 71 OF 1993/II]
23 FEBRUARY 1994

PRACTICE & PROCEDURE: Order 18 r. 19 RHC - Application to strike out plaintiff's claim.

COMPANY LAW: Director transferring shares to 1st & 2nd defendants - Share transfer entered into register by 3rd defendant - Plaintiff disagreeing with transfer of shares - Extraordinary general meeting held - 1st & 2nd defendants appointed additional directors in absence of plaintiff - Plaintiff issuing writ against defendants seeking declarations, rectification of the register and injunction - Validity of the transfer of shares - Validity of the notice to appoint and appointment of the 1st & 2nd defendants - Consideration of ss. 103, 104, 105, 145(2) of the Companies Act 1965.

The plaintiff was a director and registered shareholder of 8,083,001 shares in a family company, Poh Kwong Holdings Sdn Bhd (the company) and his son, Li Wing Fong (LWF) was the only other shareholder and director holding 11,317,001 shares. On 29 April 1993, LWF transferred 10,000 shares each to the 1st and 2nd defendants which was entered into the register of the company by the 3rd defendant, the company secretary. The registration took place a day earlier than the letter seeking approval for the transfer. The plaintiff disagreed with the transfer of shares and requested a board meeting with LWF which ended in a dead lock. Subsequently, a notice was issued on 22 May 1993 for an extraordinary general meeting where the 1st and 2nd defendants were appointed additional directors of the company in the absence of the plaintiff who did not attend although served with the notice. The plaintiff then issued a writ and statement of claim against the defendants which was amended on 17 June 1993, praying for *inter alia* declarations to the effect that the transfer of the shares, the notice to appoint and the appointment of the 1st and 2nd defendants were illegal and invalid, rectification of the register and an injunction restraining the 1st and 2nd defendants from acting as directors.